No. 80-439

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1980

ROBERT MELLI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the New York State Supreme Court, Appellate Division, First Department

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

Petitioner Robert Melli was convicted after trial on April 10, 1977 in Supreme Court, New York County (Myers, J.) of Burglary in the Third Degree and Possession of Burglar's Tools (New York Penal Law §§140.20, 140.35). His conviction was unanimously affirmed, without opinion, by the Supreme Court of the State of New York, Appellate Division, First Department, on June 5, 1980. On

June 20, 1980, the New York State Court of Appeals denied Petitioner's motion for leave to appeal. Petitioner was sentenced to a prison term of two and one-third to seven years on the burglary charge and one year on the possession of burglar's tools charge, the sentences to run concurrently.

Petitioner seeks a writ of certiorari to review the order of the New York State Supreme Court, Appellate Division, First Department.*

Statement of the Case

On April 3, 1976, Petitioner broke into an office building in the City of New York intending to steal property from a jewelry store in that building. In the midst of the burglary, Petitioner was discovered by two building employees, who scuffled with Petitioner before he broke away and escaped. Immediately thereafter, the employees described Petitioner to police at the scene, and one of them selected a photo of Petitioner from a book of "mug shots". Petitioner was arrested the following week and was identified in separate lineups by both employees.

At trial, the judge asked defense counsel if he wanted the jury to be instructed that no inference could be drawn from Petitioner's failure to testify on his own behalf. Defense counsel assented. However, apparently through inadvertence, the charge was never delivered. Following the court's charge to the jury, the judge asked defense

* Petitioner has mistakenly cast his petition in the form of a request for review of the judgment of the New York Court of Appeals. The highest state court in which a decision could be had in this case was the Supreme Court, Appellate Division, First Department, as the Court of Appeals denied leave to appeal. See 28 U.S.C. §1257.

counsel three times whether he had any objections or additional requests to charge. Although defense counsel did make some requests for charges, he neither renewed his request for a "no-inference" charge nor objected to the court's failure to give that charge. To the contrary, counsel advised the court that he was satisfied with the charge as modified.

On appeal to the Supreme Court of the State of New York, Appellate Division, First Department, Petitioner argued, *inter alia,* that he had a statutory and constitutional right to receive the "no-inference" charge. That court rejected Petitioner's claims and unanimously affirmed his conviction without opinion. Leave to appeal to the Court of Appeals was subsequently denied by Associate Judge Sol Wachtler on June 20, 1980.

ARGUMENT

Certiorari should not be granted to review the correctness of the decision of the New York Supreme Court, Appellate Division, First Department, since no constitutional question or question of federal law is presented.

This Court should not grant certiorari to review the decision below because (i) Petitioner has shown no conflict between state and federal law or between the decision below and applicable decisions of this Court; and (ii) Petitioner's constitutional claim is without merit.

Petitioner argues here, and argued unsuccessfully on his appeal below, that the trial court's failure to instruct the jury that no inference could be drawn from his failure

to testify was an error of constitutional dimensions. However, this Court has never held that such an instruction is constitutionally required.

Indeed, this Court has recently held that a trial court's refusal to give a requested charge on the presumption of innocence does not constitute automatic constitutional error. *Kentucky* v. *Whorton,* 441 U.S. 786 (1979). It would be anomalous, to say the least, to hold that the "no-inference" charge is constitutionally compelled upon request when the "presumption of innocence" charge is not so compelled. This Court has expressed a reluctance to impose invariable constitutional requirements that specific instructions be given in the state trial courts. *Kentucky* v. *Whorton, supra,* at 789. This Court should not depart from that practice here.

In addition, this Court lacks jurisdiction to review a state court judgment unless that judgment rests upon a federal ground. Indeed, where it appears that a state court judgment may have rested upon independent state grounds, this Court will not take jurisdiction to review the judgment. *Stembridge* v. *Georgia,* 343 U.S. 541, 547 (1952). The judgment which is sought to be reviewed herein may have rested upon such grounds.* New York's Criminal Procedure Law governs the time and manner of presenting an objection or request in connection with a jury instruction: it must be presented at a time when the judge can still take the desired action. Crim. Proc. L. §470.05. Yet Petitioner's attorney below, an experienced criminal trial attorney, failed to comply with the statute. To be sure, he

* The Appellate Division affirmed and the Court of Appeals denied leave to appeal without written decisions.

did assent to the trial judge's question about the "no-inference" charge prior to summation. However, when that charge was not given, counsel did not point out the non-inclusion of the charge despite having been asked three times by the trial judge whether he had any objections or further requests to charge. Thus, respondent argued below that under New York State law, Petitioner had either abandoned his request or was precluded by law from raising on appeal the absence of a no-inference charge. Crim. Proc. L. §470.05.

However, it should not be assumed that the state courts' review was limited to the question of forms and procedure. In addition to its review of possible errors of law, New York's Appellate Divisions have jurisdiction to review "in the interests of justice" those errors which are not properly preserved. Despite this broad grant of jurisdiction, the Appellate Division found no grounds on which to reverse the judgment herein. Similarly, the Court of Appeals may find an error which was not properly preserved to be reviewable if the error affects the "essential validity of the proceedings", *People* v. *Patterson,* 39 N.Y.2d 288, 296 (1976). That neither the intermediate appellate court nor the reviewing judge of the Court of Appeals saw fit to disturb the trial court's judgment strongly supports the conclusion that that judgment was both fair to Petitioner and correct as a matter of law.

In consequence of all of the above, Petitioner has raised no issue reviewable by certiorari.

Conclusion

The petition for a writ of certiorari should be denied for the above reasons.

Respectfully submitted,

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November, 1980